# STATE OF MICHIGAN

# COURT OF APPEALS

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| LAURENCE R. ELLISON and CAROL A. ELLISON,<br><br>Plaintiffs-Appellees,<br><br>v<br><br>CHARLES HOAG and SANDRA HOAG,<br><br>Defendants-Appellants. | UNPUBLISHED<br>April 27, 2006<br><br><br><br>No. 260135<br>Mecosta Circuit Court<br>LC No. 03-015558-CH |

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court order granting a default judgment to plaintiffs on their complaint to quiet title. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendants purchased property adjacent to property belonging to plaintiffs. On September 10, 2002, plaintiffs filed a summons and complaint against defendants (the "first case") to quiet title to the property line, under theories of acquiescence, repose, adverse possession, and prescription. Plaintiffs failed to serve defendants. This first case remained on the trial court's docket until it was dismissed on April 21, 2004, for lack of progress.

Meanwhile, on January 10, 2003, plaintiffs filed an identical summons and complaint against defendants (the "second case"). Further, plaintiffs failed to indicate on the summons and complaint of the second case that their first case was pending. Defendants answered the second complaint on March 3, 2003, without ever being served with or otherwise officially informed of the first complaint.

In March 2004, the trial court sent out two notices, one in each case. On March 17, 2004, a notice in the second case was sent to defendants informing them of a scheduled settlement conference on September 7, 2004, and a trial on September 28, 2004. On March 30, 2004, a notice in the first case was sent to defendants informing them of a show-cause hearing scheduled for April 19, 2004. Defendants and their counsel claim that they appeared for the hearing in the first case and were informed that the case had been dismissed for lack of progress. Defendants received a notice dated April 21, 2004, that the case had been dismissed. Defendants and their attorney maintain that they did not realize that there were two cases and thought, although mistakenly, that the only case of which they had notice had been dismissed.

Subsequently, the trial court sent five trial-status notices in the second case to defendants' counsel on April 5, 2004, June 17, 2004, August 14, 2004, August 25, 2004, and September 13, 2004, before the September 28, 2004, trial date. Defendants and their attorney claim that they thought that the court had sent the notices in error because they thought that the only case of which they had notice had been dismissed.

Defendants and their counsel did not appear on September 7, 2004, for the settlement conference in the second case. However, plaintiffs' counsel appeared. The trial court entered a default against defendants for failure to appear without consideration on the record of any other less drastic sanction. When defendants' attorney received notice of the default, he immediately moved to set it aside. The trial court applied MCR 2.603(D)(1) and denied the motion for two reasons. First, the court concluded that defendants did not show good cause for their failure to attend because the court sent defendants several notices updating the status of the scheduled trial in the second case after defendants had received the notice of dismissal in the first case. Second, the court found that, under MCR 2.603(D)(1), defendants did not submit a required affidavit of facts showing a meritorious defense. Defendants moved for reconsideration and submitted an affidavit of facts showing a meritorious defense. The trial court also denied this motion, finding that defendants' affidavit did not allege sufficient facts to show a meritorious defense. Without consideration of any less drastic sanction, the court entered a default judgment on January 4, 2005.

This Court reviews a trial court's decision to set aside a default for an abuse of discretion. *AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). This court reviews de novo an issue of law. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

Defendants argue that the trial court should have considered defendants' failure to attend the settlement conference under MCR 2.401(G)(1), not MCR 2.603(D)(1). We agree. MCR 2.401 deals with pretrial procedures, conferences, and scheduling orders. MCR 2.401(G) specifically deals with a party's failure to attend or to participate in a scheduled hearing. Under MCR 2.401, failure to attend a scheduled conference may constitute a default, but a court must excuse a failure to attend if a default would cause a manifest injustice or the failure was not the result of culpable negligence. MCR 2.603, on the other hand, deals with defaults and default judgments where the party has failed to plead. MCR 2.603(A)(1) provides: "If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party." To set aside a default or default judgment under MCR 2.603(D)(1), the defaulting party must show good cause and file an affidavit of facts showing a meritorious defense.

In this case, defendants appeared and filed an answer. Therefore, the trial court should have initially considered defendants' failure to attend the scheduled settlement conference under MCR 2.401(G), not MCR 2.603.[1] Further, under MCR 2.401(G)(1), "a failure to attend a

[1] We note the judgment states that it is entered under MCR 2.401(G). However, during the (continued…)

scheduled conference . . . . *may constitute* a default to which MCR 2.603 is applicable (emphasis added)." This characterization of a failure to attend a scheduled hearing is permissive, not mandatory. The trial court applied MCR 2.603(D)(1), without considering MCR 2.401(G), and concluded, "I believe I have no basis on which to grant the motion" because defendants did not submit an affidavit of facts showing a meritorious defense. We find that the trial court did not recognize the primacy of MCR 2.401(G) and consequently failed to consider whether the entry of the order of default would cause manifest injustice and whether defendants' and their attorney's failure to attend the hearing was the result of culpable negligence.

Accordingly, we conclude that this matter should be remanded so that the trial court will have the opportunity to apply the appropriate legal standard and review defendants' failure to attend under MCR 2.401(G).

Defendants also argue that, regardless of which court rule applies, the trial court should not have entered a default judgment before the court considered less drastic sanctions on the record. We agree. A default or a dismissal is drastic sanction that should be taken cautiously. *VandenBerg v VandenBerg*, 231 Mich App 497, 502; 586 NW2d 570 (1998). Before dismissing a complaint or entering a default judgment as a sanction, a trial court must carefully "evaluate all available options on the record and conclude that dismissal is just and proper." *Id.* A judge who fails to evaluate all the options on the record abuses his or her discretion. *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995). The appropriateness of a dismissal, or in this case, a default, as a sanction is evaluated by: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there was a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Id.* at 507.

Here, the trial court did not consider a less drastic sanction than a default judgment. Under *Vicencio*, the court should have. The record does not show that defendants' failure to attend the settlement conference was willful, that they had previously failed to attend scheduled hearings or otherwise disobeyed court orders, or that they did this to delay the case or trial. Further, defendants immediately tried to remedy their failure to attend the hearing by moving to set aside the default and on rehearing by also submitting an affidavit of facts showing a meritorious defense. Finally, there has been no showing of prejudice to plaintiffs or the court because defendants offered to compensate them for their cost in attending the settlement conference and defendants indicated that they would be ready to go to trial as scheduled.

Accordingly, we conclude that this matter should be remanded so that the trial court will have the opportunity to consider less drastic sanctions, as directed in *Vicencio*, *supra* at 506-507.

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hearing on defendants' motion to set aside the default and in the trial court's written opinion denying defendants' motion for rehearing, the court explicitly analyzed the case under MCR 2.603(D) with its requirements for good cause and an affidavit of facts showing a meritorious defense. The court did not analyze the case under MCR 2.401(G) with its consideration for manifest injustice or culpable negligence.

Finally, defendants claim that the trial court should have granted their motion for reconsideration because their affidavit alleged a sufficient factual basis to show a meritorious defense. In light of our earlier conclusion that this case should be remanded so that the trial court can apply the proper legal standard and consider less drastic sanctions, we find that we need not resolve this issue.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot